

1 DANIEL M. MAYEDA (State Bar No. 108543)
LEOPOLD, PETRICH & SMITH, P.C.
2 2049 Century Park East, Suite 3110
Los Angeles, California 90067-3274
3 Telephone: (310) 277-3333
Facsimile: (310) 277-7444
4 Email: dmayeda@lpsla.com

5 Attorneys for Defendants
Perseus Running Press, LLC and Perseus Books, LLC
6
7

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 **KEYA MORGAN,**

12 **Plaintiffs,**

13 **v.**

14 **ASSOCIATED PRESS, PERSEUS**
15 **RUNNING PRESS, LLC, PERSEUS**
16 **BOOKS, LLC, TIME HOME**
ENTERTAINMENT, INC., and DOES
1-10, inclusive,

17 **Defendants.**
18
19
20
21
22
23
24
25
26
27
28

CASE NO. 2:15-CV-03341 CBM (JEMx)

REPLY BY DEFENDANTS PERSEUS
RUNNING PRESS, LLC AND
PERSEUS BOOKS, LLC IN SUPPORT
OF MOTION TO DISMISS
PLAINTIFF'S DMCA CLAIM FROM
FIRST AMENDED COMPLAINT

DATE: September 29, 2015
TIME: 10:00 a.m.
CTRM: United States Courthouse
312 North Spring St.
Courtroom 2, 2nd Floor
Los Angeles, CA 90012

[The Hon. Consuelo B. Marshall]

1 In the Motion to Dismiss filed by Defendants Perseus Running Press, LLC and
2 Perseus Books, LLC (collectively, “Perseus”), Perseus demonstrated that:

3 (1) Plaintiff’s second count for violation of Sections 1202 and 1203 of the
4 Digital Millennium Copyright Act (DMCA) cannot state a cause of action because
5 Plaintiff has not alleged any facts that could bring this action within the ambit of the
6 DMCA; and

7 (2) Assuming *arguendo* the DMCA could apply to this case, Plaintiff failed to
8 allege that Plaintiff actually affixed copyright management information (CMI) to the
9 Allegedly Infringed Photographs before providing them to Perseus or that Perseus
10 intentionally removed such CMI and distributed the photographs to Associated Press
11 knowing that would cause Plaintiff’s copyrights to be infringed.

12 **1. This is Not a DMCA Claim**

13 Plaintiff’s Opposition to Perseus’s Motion to Dismiss (“Opp.”) at 9 specifically
14 acknowledges “there are cases which support Perseus’s interpretation of Section
15 1202” as being limited to circumstances involving “copyright management systems”
16 but argues—without supporting authority—that “the trend is moving” toward a more
17 expansive reading of the statute. In fact, as Perseus’s Motion to Dismiss explained,
18 and as Plaintiff has admitted (Opp. at 8), “the Ninth Circuit has yet to rule” on the
19 scope of Section 1202. Furthermore, unlike the unpublished Williams v. Cavelli case
20 upon which Plaintiff heavily relies (Opp. at 8-9), the only published decisions by
21 district courts within the Ninth Circuit all construe Section 1202 in a limited fashion.
22 *See* Perseus’s Motion to Dismiss at 3-4, addressing the Textile Secrets, Jacobsen and
23 Kelly cases.

24 The Third Circuit case of Murphy v. Millennium Radio Group, LLC, 650 F.3d
25 295, 302 (3d Cir. 2011) recognized that Section 1202 “might well provide an
26 additional cause of action under the DMCA in many circumstances in which only an
27 action for copyright infringement could have been brought previously,” but
28 nevertheless adopted a broad interpretation of the statute. The Ninth Circuit, however,

1 signaled that it is likely to maintain a more robust distinction between a DMCA claim
 2 and an infringement claim when it noted that “Section 1202 deals with the removal of
 3 copyright information, an altogether different violation” than a claim of copyright
 4 infringement. Polar Bear Productions, Inc. v. Timex Corp., 384 F.3d 700, 719 (9th
 5 Cir. 2004). *See also* MDY Industries v. Blizzard Entertainment, 629 F.3d 928, 942
 6 (9th Cir. 2010) (DMCA was enacted “to mitigate the problems presented by copyright
 7 enforcement in the digital age.”).

8 Given the different purposes of a DMCA claim and a claim for copyright
 9 infringement, and the fact that no published decision within this circuit has held that
 10 Section 1202 can extend to every piece of copyright “information” related to every
 11 possible work—whether or not the claim alleges that there is any technological
 12 process or copyright management system involved—this Court should not allow
 13 Plaintiff’s Section 1202 claim to proceed. To deny the Motion would not only give
 14 Plaintiff two shots at the same allegedly infringing conduct—but it would also
 15 unjustly revive Plaintiff’s claim for attorneys’ fees and statutory damages which he
 16 lost because he failed to register his copyright in a timely manner. *See* Perseus’s
 17 Motion to Dismiss at 2, 6 n.1.

18 **2. Even if Section 1202 is Broadly Construed, Plaintiff Has Not Alleged**
 19 **Underlying Facts to Bring it Within a Claim for “Falsification of**
 20 **Copyright Management Information”**

21 Plaintiff argues he has adequately parroted the requisite elements of a Section
 22 1202 claim. But, in fact, Plaintiff’s First Amended Complaint only alleges that:

- 23 • The Allegedly Infringed Photographs “included” some unspecified copyright
 24 management information identifying that Plaintiff owned the copyright to
 25 his photographs (FAC ¶25);
- 26 • Perseus knew that Plaintiff was the copyright owner of the photographs
 27 (FAC ¶25); and
- 28 • Perseus “removed the Keya Morgan credit from the photographs” before

1 providing them to third parties (FAC ¶26).

2 Unlike every other case in which a court has allowed a Section 1202 claim to
 3 proceed, here Plaintiff essentially alleges only that Perseus somehow knew Plaintiff
 4 owned the copyright to the Allegedly Infringed Photographs and distributed those
 5 photographs without giving Plaintiff credit. That, at most, is a copyright infringement
 6 claim, not one for Falsification of Copyright Management Information under Section
 7 1202.

8 This can be seen by comparing the allegations in the cases upon which Plaintiff
 9 relies:

- 10 • Murphy v. Millennium Radio, 650 F.3d at 301 (plaintiff alleged that he
 11 placed or caused to be placed a “gutter credit” along the edge of his
 12 photograph and that the defendant intentionally removed it);
- 13 • Fox v. Hildebrand, 2009 WL 1977996 (C.D. Cal. July 1, 2009) (handwritten
 14 copyright notice placed on architectural drawings were replaced by
 15 defendant’s copyright notice);
- 16 • Leveyfilm, Inc. v. Fox Sports Interactive Media, LLC, 999 F.Supp.2d 1098
 17 (N.D. Ill. 2014) (defendant allegedly removed plaintiff’s credit from back of
 18 photograph before republishing);
- 19 • Agence France Presse v. Morel, 769 F.Supp.2d 295 (S.D.N.Y. 2011)
 20 (photographer’s name and copyright notice linked to photos posted on
 21 Twitter);
- 22 • Interplan Architect, Inc. v. C.L. Thomas, Inc., 2009 WL 6443117 (S.D. Tex.
 23 Nov. 13, 2009) (company name and logo on architectural drawing removed
 24 by defendant);
- 25 • McClatchy v. The Associated Press, 2007 WL 776103, at *1-*2 (W.D. Pa.
 26 March 9, 2007) (plaintiff’s photograph bore her title and copyright
 27 information; defendant took a snapshot of the photo and cropped the picture
 28 to remove the plaintiff’s title and copyright notice);

- Williams v. Cavelli, 2015 WL 1247065, at *3 (C.D. Cal. Feb 12, 2015) (plaintiff's signature on murals made "indiscernible" in photographs of the murals used by defendant).

Here, where Plaintiff mainly "recite[d] the statutory elements" without alleging a genuine underlying basis for a DMCA violation, the Motion to Dismiss should be granted. Brown v. Stroud, 2011 WL 2600661, at *6 (N.D. Cal. June 30, 2011) (granting motion to dismiss Section 1202 claim).

3. Conclusion

Plaintiff's second cause of action for Falsification of Copyright Management Information under Section 1202 of the DMCA is simply an improper attempt to bootstrap a claim that carries attorneys' fees and statutory damages to an ordinary copyright infringement claim. Perseus's Motion to Dismiss should be granted and the purported Section 1202 claim dismissed.

DATED: September 15, 2015

LEOPOLD, PETRICH & SMITH, P.C.

By: /s/ Daniel M. Mayeda
 DANIEL M. MAYEDA
 Attorneys for Defendants
 Perseus Running Press, LLC and Perseus
 Books, LLC